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Thursday, September 28, 2006

Arbitrary detainment and suspension of *habeas corpus*

I am horrified by the legislation the U.S. Senate passed today. It will, short of a miracle, be signed by President Bush into law. The bill:

(1) Suspends *habeas corpus* for all aliens, including tens of millions of aliens within the United States and its territories. This means resident aliens can be imprisoned, tortured, etc. without recourse to U.S. courts to challenge the legality of any kind of detention or treatment, no matter how despicable or illegal that treatment may be. *Habeas corpus* has protected the rights of all residents imprisoned in English and United States territory, by ensuring them appeal from abusive detention to the normal courts of the land, under English and United States law for over 900 (that's nine hundred) years. *Habeas corpus* is the wellspring of all other legal protections we have against abuse of the power to detain or imprison. For a substantial part of the U.S. population, and for all foreigners, it is now gone. (It should be noted that there has been traditionally and does need to be an exception for aliens on an actual battlefield, otherwise the ability of our military to fight would be severely compromised. But this legislation excludes *all* aliens from *habeas* protection, including the tens of millions of aliens living peacefully within or peacefully visiting the U.S.).

(2) Subjects all persons, including all U.S. citizens, at the whim of the executive branch, to arbitrary detention, for indefinitely long periods of time, as "enemy combatants." Although U.S. citizens still have an appeal to normal courts via *habeas corpus*, the tendency of recent courts to defer to legislation over fundamental liberty rights disturbingly suggests a large free hand for the executive branch, regardless of the party of the President, here too.

The vote was mostly along party lines; here are the exceptions (h/t Glenn Greenwald):

> Democrats in favor (12) - Carper (Del.), Johnson (S.D.), Landrieu (La.), Lautenberg (N.J.), Lieberman (Conn.), Menendez (N.J), Nelson (Fla.), Nelson (Neb.), Pryor(Ark.), Rockefeller (W. Va.), Salazar (Co.), Stabenow (Mich.).
>
> Republicans against (1) - Chafee (R.I.).

Sununu (R-NH) and Specter (R-PA) tried to reverse the suspension of *habeus corpus,* but failing that voted for the final bill despite their objections.

While the media focused attention on the more dramatic issue of what kinds of torture or inhumane treatment would be considered technically legal under the bill, for aliens this question is now moot, because, at the whim of the executive branch, they will not be able to raise the issue in front of anything but a military tribunal. And if they are not charged with any crime they will not even get a

Pages

- Home

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Nick Szabo

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military tribunal, because the bill allows for indefinite and arbitrary detention of aliens defined, at the whim of the executive branch, as "enemy combatants."

Marty Lederman also has a good description of this legislation.

That this bill will be signed into law is now *fait accompli*. The only recourse we have now is the ballot box this fall to punish the Representatives and Senators who have surreptitiously stolen some of our most basic and hard-won freedoms.

Posted by Nick Szabo at 10:44 PM

Newer Post Home Older Post

Blog Archive

- ► 2018 (1)
- ► 2017 (3)
- ► 2016 (4)
- ► 2015 (3)
- ► 2014 (3)
- ► 2013 (3)
- ► 2012 (8)
- ► 2011 (12)
- ► 2010 (9)
- ► 2009 (29)
- ► 2008 (55)
- ► 2007 (47)
- ▼ 2006 (130)
  - ► December (4)
  - ► November (7)
  - ► October (15)
  - ▼ September (15)
    - More on arbitrary detainment and habeas corpus sus...
    - Arbitrary detainment and suspension of habeas corp...
    - A's win the West!
    - Patent infringed by cat?
    - Why Kelo was way off
    - Incorporation of the Second Amendment
    - Blown down in the wind: property rights and the pu...
    - Artificial atoms
    - Due process property rights
    - Semayne's Case: liberty of the house
    - NASA urban legends
    - Another good use for pseudonyms
    - Law of the dominant paradigm
    - An international non-delegation doctrine

Laptop searches at will at U.S. customs

- ► August (20)
- ► July (5)
- ► June (10)
- ► May (4)
- ► April (3)
- ► March (11)
- ► February (10)
- ► January (26)

► 2005 (44)

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